IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

THE JOHNSON REVOCABLE LIVING TRUST, ALLEN JOHNSON, and LINDA JOHNSON, Plaintiffs, v. DAVIES US, LLC, a Delaware Limited Liability Company, f/k/a DAVIES US, INC., a Delaware Corporation, and DAVIES GROUP LIMITED, an England and Wales Private Limited Company, Defendants.	)	C.A. No.: N22C-03-148 EMD CCLD

Submitted: August 25, 2022
Decided: November 18, 2022

Upon Defendants' Motion for Judgment on the Pleadings
DENIED

Brett M. McCartney, Esquire, Elizabeth A. Powers, Esquire, Gabriel B. Ragsdale, Esquire, Bayard, P.A., Wilmington, Delaware, Robert J. Bartz, Esquire, Joe M. Fears, Esquire, Barber & Bartz, P.C., Tulsa, Oklahoma. *Attorneys for Plaintiffs The Johnson Revocable Living Trust, Allen Johnson, and Linda Johnson.*

Eric Lopez Schnabel, Esquire, Alessandra Glorioso, Esquire, Dorsey & Whitney (Delaware) LLP, Wilmington, Delaware, Gregory S. Tamkin, Esquire, Dorsey & Whitney LLP, Denver, Colorado, Anthony Badaracco, Esquire, Dorsey & Whitney LLP, New York, New York. *Attorneys for Defendants Davies US, LLC, Davies US Inc., and Davies Group Limited.*

DAVIS, J.

I. INTRODUCTION

This is a civil breach of contract action assigned to the Complex Commercial Litigation Division of the Court. This is a declaratory judgment and breach of contract action against Defendants for refusal to pay Plaintiffs their pro rata shares of the Accelerated Deferred Consideration pursuant to their Stock Purchase Agreement.

In October 2020, Plaintiffs the Johnson Revocable Living Trust, Allen Johnson, and Linda Johnson (collectively "Sellers" or "Plaintiffs") sold their business, Johnson Claim Services, Inc. (the "Company"), to Defendant Davies US LLC ("Davies US" or "Buyer") pursuant to a written Stock Purchase Agreement (the "SPA"). The SPA provides that a portion of the purchase price was not to be paid at closing but was designated as "Deferred Consideration." Additionally, Deferred Consideration would be "Accelerated" and immediately payable to Sellers by Davies US upon the consummation of a "Change of Control Event" as defined in the SPA.

On March 23, 2022, the Johnson Revocable Living Trust filed a Complaint to recover its pro rata shares of the Accelerated Deferred Consideration. Plaintiffs allege that a Change of Control Event has occurred by means of a purchase of Davies US's indirect parent Davies Topco Limited. Now, Defendants move for Judgment on the Pleadings (the "Motion") pursuant to Superior Court Civil Rule 12(c).

For the reasons stated below, the Court **DENIES** the Motion.

II. RELEVANT FACTS

A. THE PARTIES

Plaintiff the Johnson Revocable Living Trust (the "Trust") is an Oklahoma revocable living trust located in Oklahoma.[1] Allen Johnson is its Trustee.[2] Allen Johnson and Linda Johnson are beneficiaries of the Trust.[3] Plaintiffs Allen Johnson and Linda Johnson are individual citizens and residents of the State of Oklahoma.[4]

[1] D.I. No. 1, Complaint (hereinafter "Compl.) ¶ 4.
[2] *Id.*
[3] *Id.*
[4] *Id.* ¶¶ 5-6.

Defendant Davies US is a Delaware limited liability company.[5] Davies US is authorized to do business in the State of Delaware.[6] Defendant Davies Group Limited ("Davies Group") is an England and Wales private limited company with its principal place of business in London, England.[7] Davies Group does business in the State of Delaware.[8] Davies Group wholly owns Davies US.[9]

Non-party Davies Topco Limited ("Topco") is a Jersey private limited company.[10] "Topco is the ultimate parent company of Davies Group and owns a majority interest in Davies Group through several layers of parent companies."[11]

Non-party BC Partners LLP ("BCP") is a private equity firm based in London, England.[12]

B. THE STOCK PURCHASE AGREEMENT

Prior to the SPA, Plaintiffs owned 89.975% of the issued and outstanding shares of capital stock in the Company.[13] On October 30, 2020, Sellers[14] and Buyer[15] entered into the SPA.[16] The SPA was a formal agreement by which Sellers agreed to sell, and Davies US agreed to purchase, 100% of the capital stock of the Company.[17] The agreed Purchase Price was $10,400,000,[18] "payable to Sellers according to their pro rata share ownership."[19] Of this

[5] *Id.* ¶ 7.
[6] *Id.*
[7] *Id.* ¶ 8.
[8] *Id.*
[9] *Id.*
[10] *Id.* ¶ 9. Jersey is in reference to the Island of Jersey, which is part of the English Channel Islands.
[11] *Id.*
[12] *Id.* ¶ 10.
[13] *Id.* ¶ 16.
[14] Defined in the SPA as the Trust, Allen and Linda Johnson, and non-party Bryan Scott Johnson. *See* D.I. No. 10, Defendants Davies US LLC and Davies Group Limited's Motion for Judgment on the Pleadings (hereinafter "Mot."), Ex. 1, Stock Purchase Agreement (hereinafter "SPA") at 1.
[15] Defined in the SPA as Davies US. SPA at 1. Davies Group is defined as "Buyer Parent." *Id.*
[16] *See* SPA.
[17] Compl. ¶ 17.
[18] SPA § 1.3(a).
[19] Compl. ¶ 18.

amount, the sum of "up to" $1,500,000 in "contingent consideration" was designated as "Deferred Consideration."[20] On October 30, 2020, the transaction closed and Davies US acquired the Company's stock pursuant to the terms of the SPA.[21]

Section 4.22 of the SPA provides the following about the Deferred Consideration:

> In the event that, after the Closing and prior to the second anniversary of the Closing Date, . . . Company undergoes a Change of Control Event . . . Buyer shall pay to Sellers an amount equal to the Accelerated Deferred Consideration by wire transfer of immediately available funds to accounts designated in writing by Sellers . . . . In the event the Accelerated Deferred Consideration is due as a result of a Change of Control Event, such payment shall be due upon the consummation of such Change of Control Event.[22]

"Accelerated Deferred Consideration" is defined in Section 1.1(c) of the SPA as $1,500,000.[23] A "Change of Control Event" is defined in the SPA as:

> ***"Change of Control Event"*** means any of the following, directly or indirectly: (i) a sale, lease, exchange or other transfer (in one transaction or a related series of transactions) of the Business or all or substantially all of the Company's assets; (ii) consummation of a merger or consolidation of the Company with or into any other Person (other than an Affiliate of Buyer, provided that such Affiliate assumes Buyer's obligations arising out of this Agreement); or (iii) the sale of 50% or more of the equity ownership or voting power of the then-outstanding capital stock of the Company (whether in a single transaction or a related series of transactions) to any single person or "group" (as defined the Securities Exchange Act of 1934) of Persons; provided, however, that a Change of Control Event shall not include any sale or transfer referenced in (i), (ii) or (iii) above made pursuant to a plan of liquidation, dissolution, merger, consolidation or other reorganization of Buyer under any provisions of federal or state bankruptcy or insolvency Law.[24]

C. CHANGE OF CONTROL

On March 15, 2021, "an agreement was signed for the acquisition of a controlling majority interest in" Topco by BCP (the "BCP Purchase").[25] "Pursuant to the BCP Purchase,

[20] *Id.*; SPA § 1.3(a)(iii).
[21] Compl. ¶ 24.
[22] SPA § 4.22.
[23] SPA § 1.1(c).
[24] SPA § 1.1(l).
[25] Compl. ¶ 25.

[BCP] obtained control of [Topco], and through [Topco], obtained control of Davies Group, Davies US, and the Company."[26] The BCP Purchase closed on August 3, 2021.[27]

Davies US did not pay the Accelerated Deferred Consideration.[28] Plaintiffs made a demand upon Davies US, and upon Davies Group as guarantor, for the payment of the Accelerated Deferred Consideration.[29] Davies US and Davies Group responded and denied that a 'Change of Control Event' had occurred because of the BCP Purchase and refused to pay Plaintiffs the Accelerated Deferred Consideration.[30]

D. CURRENT LITIGATION

On March 23, 2022, Plaintiffs filed the Complaint against Defendants Davies US and Davies Group (collectively "Davies").[31] The Complaint contains two counts: Count I- Declaratory Judgment Against All Defendants and Count II- Breach of Contract Against Davies US.[32] On May 25, 2022, Davies filed an Answer to Plaintiffs' Complaint.[33]

On May 25, 2022, Davies filed the present Motion.[34] On June 24, 2022, Plaintiffs filed an Answering Brief in Opposition to the Motion (the "Opposition").[35] On July 15, 2022, Davies filed a Reply Brief in Support of the Motion (the "Reply").[36] The Court held a hearing on the Motion, the Opposition and the Reply on August 25, 2022. At the conclusion of the hearing, the Court took the Motion under advisement. In addition, the Court stay discovery pending

---

[26] *Id.*
[27] *Id.* ¶ 26.
[28] *Id.* ¶ 29.
[29] *Id.*
[30] *Id.* ¶ 30.
[31] D.I. No. 1.
[32] *Id.*
[33] D.I. No. 9.
[34] D.I. Nos. 10-18.
[35] D.I. No. 27, Plaintiffs' Answering Brief in Opposition to the Motion (hereinafter "Opp.").
[36] D.I. No. 38, Defendants Davies US LLC and Davies Group Limited's Reply in Support of the Motion (hereinafter "Reply").

additional review of the Motion, promising to contact the parties within two weeks. I failed to meet this deadline and I have no real excuse for failing to follow up with the parties. I apologize for this oversight.

III. PARTIES' CONTENTIONS

A. MOTION

Davies contends that the Complaint must be dismissed because BCP's acquisition of a majority stake in Topco is not a "sale of the Company" constituting a Change of Control Event as defined by the SPA.[37] Davies argues that there has been no breach of the SPA, no Change of Control of Event, and that Davies US owned the Company before March 2021 and still owns it now. Davies' arguments rest on the contention that Davies US did not indirectly sell the Company and that Plaintiffs' interpretation of the SPA is unreasonable.

B. OPPOSITION

Plaintiffs argue that Davies do not satisfy the legal standard under Rule 12(c) and as such the Motion should be denied. Plaintiffs contend that the term indirect sale in the SPA includes a transaction involving an upstream entity. Further, Plaintiffs argue that the cases which Davies relies on are distinguishable from the case at bar and as such are not controlling.

IV. STANDARD OF REVIEW

A party may move for judgment on the pleadings pursuant to Civil Rule 12(c).[38] The Court, in determining a motion under Civil Rule 12(c) for judgment on the pleadings, must view

---

[37] Mot. at 3.

[38] Civil Rule 12(c) provides:

> *Motion for judgment on the pleadings* — After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Del. Super. Civ. R. 12(c).

the facts pleaded and the inferences to be drawn from such facts in a light most favorable to the non-moving party.[39] "The Court must take the well-pleaded facts alleged in the complaint as admitted."[40] When considering a motion under Civil Rule 12(c), the Court also assumes the truthfulness of all well-pled allegations of fact in the complaint.[41] Therefore, the Court shall give plaintiffs opposing a Rule 12(c) motion the same benefits as a plaintiff defending a motion under Civil Rule 12(b)(6).[42] The Court may grant a motion for judgment on the pleadings only when no material issue of fact exists and the movant is entitled to judgment as a matter of law.[43]

V. DISCUSSION

This dispute concerns whether a certain provision of the SPA has been triggered such that Plaintiffs are entitled to Deferred Consideration. Plaintiffs assert an interpretation that if correct would entitle them to compensation. Davies counters by asserting that such a reading is unreasonable and should be rejected by the Court on a motion for judgment on the pleadings. The decision is governed upon the legal standard of Rule 12(c). As set out below, Davies fails to satisfy this legal standard.

The definition in question is found in Section 1.1(l) of the SPA, which defines a *Change of Control Event*, to

> mean[] any of the following, directly or indirectly: (i) a sale, lease, exchange or other transfer (in one transaction or a related series of transactions) of the Business or all or substantially all of the Company's assets; (ii) consummation of a merger or consolidation of the Company with or into any other Person (other than an Affiliate of Buyer, provided that such Affiliate assumes Buyer's obligations arising out of this Agreement); or (iii) the sale of 50% or more of the equity ownership or voting power of the then-outstanding capital stock of the Company (whether in a

[39] *See Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993); *see also Warner Commc'ns, Inc. v. Chris–Craft Indus., Inc.*, 583 A.2d 962, 965 (Del. Super.), *aff'd without opinion*, 567 A.2d 419 (Del. 1989).
[40] *See Desert Equities, Inc.*, 624 A.2d at 1205; *Warner Commc'ns, Inc.*, 583 A.2d at 965.
[41] *See McMillan v. Intercargo Corp.*, 768 A.2d 492, 499-500 (Del. Ch. 2000).
[42] *See id.* at 500.
[43] *See Desert Equities, Inc.*, 624 A.2d at 1205; *Warner Commc'ns, Inc.*, 583 A.2d at 965.

> single transaction or a related series of transactions) to any single person or "group" (as defined in the Securities Exchange Act of 1934) of Persons; provided, however, that a Change of Control Event shall not include any sale or transfer referenced in (i), (ii) or (iii) above made pursuant to a plan of liquidation, dissolution, merger, consolidation or other reorganization of Buyer under any provisions of federal or state bankruptcy or insolvency Law.[44]

The root of the parties' dispute is over the word "indirectly," and whether "indirectly" in the context of the SPA refers solely to a sale of the company itself, through direct or indirect means, or whether it can also refer to an upstream transaction that indirectly affects the control of the Company.

A. DEFENDANTS MUST PRECLUDE PLAINTIFFS' INTERPRETATION OF THE SPA.

For this Motion, the Court need not decide between Plaintiffs' and Davies' interpretation of the SPA. Rather the Court must decide whether Plaintiffs' interpretation of the SPA is a reasonable one, or inversely that Davies' interpretation is the only reasonable interpretation of the provision.[45] Davies have the burden of establishing that the Plaintiffs' interpretation is not reasonable.[46]

Thus, the question here is whether Davies have shown that BCP's purchase of Topco was not "directly or indirectly: . . . (iii) the sale of 50% or more of the equity ownership or voting power of the then-outstanding capital stock of the Company . . ." such that the Change of Control provision was triggered.

---

[44] SPA § 1.1(1).

[45] *AT&T Corp. v. Lillis*, 953 A.2d 241, 253 (Del. 2008) ("[i]f there is more than one reasonable interpretation of a disputed contract term, consideration of extrinsic evidence is required to determine the meanings the parties intended.") quoting *Appriva S'holder Litig. Co., LLC v. ev3, Inc.*, 937 A.2d 1275, 1291 (Del. 2007)); *see Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 925 (Del. 2017) ("[J]udgment on the pleadings . . . is a proper framework for enforcing unambiguous contracts because there is no need to resolve material disputes of fact." (citation omitted)).

[46] *Cooper Tire & Rubber Co. Apollo (Mauritius) Hldgs. Pvt. Ltd.*, 2013 WL 5787958, at *4 (Del. Ch. Oct. 25, 2013) ("[T]he moving party . . . has the burden of establishing that its interpretation . . . is the only reasonable interpretation." (citation omitted)); *see id.* ("In other words, if both . . . interpretations . . . are reasonable, then [the moving party's] Motion for Judgment on the Pleadings must be denied, and the Court must determine the intent of the parties at trial.")

B. DAVIES HAVE NOT PRECLUDED PLAINTIFFS' INTERPRETATION OF THE SPA AS NECESSARY UNDER RULE 12(C).

Davies' argument rests on the fact that the Company's "management has not changed" and that the same management, Davies US, "still owns and controls" the Company.[47] Davies acknowledge that BCP acquired a majority interest in Topco which Davies refers to as "an indirect distant parent of Davies US."[48] Davies downplay the relationship between Topco and Davies US. Specifically, Davies states that Topco is "an indirect *distant parent*" of Davies US, but the SPA states that Davies US "is an indirectly owned subsidiary of Topco."[49]

Davies are steadfast in their position that "BCP's acquisition of a majority interest in Topco does not change the fact that Davies US continues to own 100% of the Company."[50] To Davies, "an indirect sale must still be an actual sale of some sort, and Davies US still owns" the Company.[51] Thus, "a sale by Davies US, directly or indirectly, of its interest in the Company" has not occurred, and therefore the provision has not been triggered.[52]

Davies assert that Plaintiffs could have included the language they now press, but chose not to, and Davies urge the Court to not rewrite the SPA.[53] Davies argues that the Court should follow *Am. Bottling Co. v. BA Sports Nutrition, LLC* and grant judgment on the pleadings.[54] Davies assert that *Am. Bottling Co.* stands for the position that "a change in ownership of an upstream related company does not constitute a downstream 'change of control' pursuant to

[47] Mot. at 1.
[48] *Id.* at 2 (citing Compl. ¶¶ 9-10, 25-26).
[49] *Id.* at 2; SPA Preamble.
[50] Mot. at 3.
[51] *Id.*
[52] *Id.* (italics omitted).
[53] *Id.* at 5-6.
[54] 2021 WL 6068705 (Del. Super. Dec. 22, 2021)

contracts containing provisions that are substantially similar to the one in the SPA."[55] At this stage, the Court does not agree with Davies' argument as to *Am. Bottling Co*.

In *Am. Bottling Co.*, the Court found that under the plain language of the contract, "there must be a transfer of the Distribution Agreement or ABC's duties and privileges thereunder to trigger BodyArmor's right to terminate 'With Cause.'"[56] Further, the Court found that a "change in management or change in control occur[ing] at ABC or its parent or grandparent levels is not enough to indicate a 'transfer' occurred."[57] This case does not concern the transferring of a distribution agreement; rather, it concerns whether an indirect sale in the context of the SPA refers only to a sale of the Company, or whether it can also mean an upstream change of control.

Additionally, Davies contend the placement of the operative verb in the contract underlying the dispute in *Am. Bottling Co.* should guide the Court here. Despite Davies argument, the language of the two contracts is different and it is unclear how the Court's opinion in *Am. Bottling Co.* is of any assistance to interpretation of the SPA.[58]

Davies assert next that *Veloric v. J.G. Wentworth, Inc.*[59] is instructive for the proposition that "the merger of [an] indirect subsidiary d[oes] not effect a change in control of any assets actually owned directly by the parent, [and therefore] there [is] no change of control."[60] However, the Court does not find *Veloric* helpful here.

The issue in *Veloric* was not the general conclusion that a change of control of a parent does not affect a subsidiary, it was that the specific contractual language at issue in *Veloric* meant that change of control occurred (under the fourth scenario) by "sale or other disposition,

[55] Mot. at 7.
[56] *Am. Bottling Co.*, 2021 WL 6068705, at *9.
[57] *Id.*
[58] Mot. at 8.
[59] 2014 WL 4639217, at *13 (Del. Ch. Sept. 18, 2014).
[60] Mot.. at 8-9 (citing *Veloric*, 2014 WL 4639217, at *13).

directly or indirectly, by [Wenworth] of all or substantially all of [Wentworth's] assets."[61] Further, the Court of Chancery found that the "Wentworth's assets" referred only to its assets, and not the assets of its subsidiaries because (1) the contractual language specified Wentworth's assets and (2) because in the preceding paragraph the term "subsidiaries" was used such that "when the parties to the [Agreement] intended to include subsidiaries, they did so expressly."[62] That is not the case here. Additionally, even if it were applicable, it does not assist the Court's analysis because the Plaintiffs are arguing that SPA Section 1.1(1)(iii),[63] not SPA Section 1.1(1)(i),[64] was triggered. SPA Section 1.1.(1)(i) ("sale, lease, or exchange . . . of the Business or all or substantially all of the Company's assets") would be the section most similar to the provision at issue in *Veloric*.

As the Court reads *Veloric* and *Am. Bottling Co.*, Davies' argument lacks support that the SPA cannot be read in the way that Plaintiffs have proffered, or that Davies' interpretation is the only reasonable interpretation of the SPA.

Next, Davies contend that the grammatical canon of contract interpretation supports its interpretation. Specifically, Davies maintain that that "[t]he adverb 'indirectly' does not apply to 'the Company'; [rather] it applies to the required action–a sale."[65] Davies cite to the Chicago Manual of Style to argue that adverbs do not modify nouns.[66] However, this argument is equally unpersuasive because the word Company is not being modified, if anything the word sale is

[61] *Veloric*, 2014 WL 4639217, at *4 (brackets in original).
[62] *Id.* at *13.
[63] "(iii) the sale of 50% or more of the equity ownership or voting power of the then-outstanding capital stock of the Company. . ." SPA § 1.1(c).
[64] "(i) a sale, lease , exchange or other transfer (in one transaction or a related series of transactions) of the Business or all or substantially all of the Company's assets. . ." SPA §1.1(c).
[65] Mot. at 9.
[66] *Id.*

being modified, or selling, which is its operative verbal form, which can be modified by an adverb.

Davies expand on the grammatic canon in the Reply. Specifically, Davies claim that the word "'indirectly' modifies 'sale, lease, exchange or other transfer.'"[67] But Plaintiffs are arguing that the third scenario was triggered, not the first.[68] And while it is true that the word indirectly modifies SPA Section 1.1(1)(i), the word indirectly must also modify both SPA Section 1.1(1)(ii) and SPA Section 1.1(1)(iii). Additionally, while SPA Section 1.1(1)(i) refers to an indirect sale, SPA Section 1.1.(1)(iii) states "directly or indirectly . . . (iii) the sale of 50% or more of the equity ownership or voting power of the then-outstanding capital stock of the Company." If the only scenario imagined was an indirect sale of the Company, then SPA Section 1.1(1)(iii) could have removed the language: "the equity ownership or voting power of." It did not. Contracts should be read to give meaning to every word.[69] That does not mean, at this stage of the proceedings, Plaintiffs' interpretation is correct, rather it means Davies have failed to preclude Plaintiffs' interpretation.

Last, Davies argue that the intent of the SPA makes clear that the triggering event did not occur.[70] Specifically, Davies contend that the purpose of the deferred consideration provision was "to protect Sellers from Davies US ceasing to own, operate, and control the Company."[71] While, intent can be determined at the motions stage, Davies have not demonstrated that the parties' clearly intended to preclude any action related to Topco from affecting the change in

[67] Reply at 5.
[68] Compl. ¶ 26.
[69] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) ("Courts will read a contract as a whole and . . . will give each provision and term effect, so as not to render any part of the contract mere surplusage" (citation omitted)).
[70] Mot. at 10.
[71] *Id*. at 11.

control provision.[72] Davies argue that because the entire SPA concerns the relationship between Davies US and the Company, it would be unreasonable to conclude that any action by Topco could impact what is, primarily, a contract between Davies US and the Company. This argument seems to ignore the fact that the relationship between Topco and Davies US is specified on the first page of the SPA and throughout the document. Davies, therefore, have failed to demonstrate that its interpretation of the SPA with respect to upstream control is correct and failed to preclude other possibilities proffered by Plaintiffs.

VI. CONCLUSION

For the reasons stated above, the Court **DENIES** the Motion.

IT IS SO ORDERED.

November 18, 2022
Wilmington, Delaware

/s/ Eric M. Davis
Eric M. Davis, Judge

cc: File&ServeExpress

[72] *Vinton v. Grayson*, 189 A.3d 695, 704 (Del. Super. 2018) ("In deciding a contract interpretation dispute, the court will first examine the entire agreement to determine whether the parties' intent can be discerned from the express words used or, alternatively, whether its terms are ambiguous." (citations and internal quotation marks omitted)).